Supreme Court, U.S.
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No. 93-1580

In The

Supreme Court of the United States

October Term, 1993

GREGORY C. KRUG,

Petitioner,

vs.

AMBROSE, WILSON, GRIMM & DURAND, and WILLIAM C. WILSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF ISSUES

A. CLAIMS BASED UPON CONTRAVENTION OF STATE LAW WHICH ARE SUPPORTED BY LONG-ESTABLISHED LEGAL DOCTRINES DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES

B. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS WHERE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO NEGLIGENCE ON THE PART OF ANY DEFENDANTS

C. ADDITIONAL FACTORS WHICH WERE PRESENTED TO THE COURTS BELOW SUPPORTING THE GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS INCLUDE

   I. COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

   II. PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

   III. ABSENCE OF ATTORNEY/CLIENT RELATIONSHIP

   IV. NON-RESIDENT FIDUCIARY

RULE 29.1 STATEMENT

Ambrose, Wilson, Grimm and Durand is a Tennessee partnership.

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STATEMENT OF THE CASE

A. SUMMARY OF PROCEDURAL HISTORY

The plaintiff and petitioner, Gregory C. Krug, filed this action in the United States District Court for the Eastern District of Tennessee on June 10, 1991. In the initial Complaint, Mr. Krug made claims of legal malpractice against Ambrose, Wilson, Grimm & Durand ("Ambrose Wilson") and also against William C. Wilson ("Wilson"), a member-partner of Ambrose Wilson (collectively referred to as respondents). Mr. Krug's Complaint alleged negligent advice in connection with a Partnership Agreement arbitration clause, breach of the Tennessee Code of Professional Responsibility (EC 5-17, DR 5-105) and a conflict of interest in suing Mr. Krug.

Mr. Krug filed an Amended Complaint on September 17, 1991, which added two new defendants: Paul T. Coleman, a former member of Ambrose Wilson, and Valley Fidelity Bank and Trust Company ("Valley Fidelity"). The Amended Complaint alleged that Wilson violated DR 7-102 of the Tennessee Code of Professional Responsibility. It also alleged that the defendants violated an *in terrorem* clause found in the Will of George C. Krug. Mr. Gregory Krug asserted that legal fees paid to the defendants in connection with the underlying Chancery Court lawsuit were "benefits" within the meaning of the *in terrorem* clause and that such fees should be refunded to the George C. Krug Trust due to the alleged breach of the *in terrorem* clause. The Amended Complaint also said that the fees charged by the defendants in connection with the underlying Chancery Court lawsuit were unreasonable and excessive and Mr. Krug sought a refund of these fees.

The respondents filed a Motion for Summary Judgment on the grounds that the Complaint failed to state a claim upon which relief can be granted, that the claim was barred by the applicable Statute of Limitations, that no attorney/client relationship existed between Mr. Krug and these respondents, and that no evidence of negligence existed on the part of these respondents. Filed in support of the Motion for Summary Judgment was the affidavit of an expert witness, Mr. Fred Thomforde, which stated that the defendants had complied with the appropriate standard of care. No counter-affidavit was filed by the plaintiff.

The United States District Court granted respondents' Motion for Summary Judgment. The Honorable Leon Jordan ruled that even after resolving all evidence in the light most favorable to the plaintiff, there is no issue of fact showing that the respondents breached the applicable standard of professional care. Judge Jordan ruled that the plaintiff had been given a "very full opportunity" to carry his burden and present the necessary proof but that he had failed to do so. (Memorandum Opinion and Order (of District Court) filed January 19, 1993, p. 5; Record Document No. 61).

Mr. Krug filed a Notice of Appeal to the Sixth Circuit Court of Appeals on February 5, 1993. The Sixth Circuit affirmed the District Court's decision on January 3, 1994.

B. STATEMENT OF FACTS

This case arises out of the administration of family Trusts initially established by the plaintiff's father, George C. Krug. Greg Krug was originally a co-trustee of

the family Trusts along with his mother, Eleanor Krug. However, disputes arose between mother and son, and Mrs. Krug exercised her discretionary power under the terms of the Trusts to remove and replace Greg Krug as co-trustee. A Chancery Court lawsuit had to be brought by Mrs. Krug to replace Greg. Mrs. Krug was represented in that action by these respondents. This Chancery Court lawsuit is the basis for this legal malpractice action.

On or about May 4, 1987, George C. Krug, father of Gregory Krug, established the George C. Krug Trust. The Trust Agreement named George C. Krug and his wife, Eleanor Baron Krug, as trustees. The Trust Agreement provided that the George C. Krug Trust was to be divided into three separate Trusts upon the death of George C. Krug, and it provided that the plaintiff would succeed his father as co-trustee of the three resulting Trusts. However, co-trustee Eleanor Krug was granted absolute discretion to remove and replace her son Gregory Krug as co-trustee. In addition, the plaintiff is also a remainder beneficiary of the three resulting Trusts. (Deposition of Gregory C. Krug, pp. 80-83; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). The Trust Agreement was amended by George C. Krug on July 6, 1987, October 5, 1987, and again on November 5, 1987. (Deposition of Gregory C. Krug, p. 83; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibits 5, 6, and 7 to Deposition of Gregory C. Krug).

In addition to the Trusts described above, George C. Krug also established Trusts designated as the "Carol Elaine Krug Trust" (established July 17, 1974) and the

"Eleanor Baron Krug Revocable Trust" (established May 1, 1985).

At some point in or around 1984, Gregory Krug and his father, George C. Krug, allegedly entered into an oral agreement whereby the two agreed to form a general partnership to be known as Krug Investments. In 1985, the plaintiff and his father executed a document memorializing their agreement. (Deposition of Gregory C. Krug, pp. 88-89; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 8 to Deposition of Gregory C. Krug).

George C. Krug died on July 7, 1988. (Deposition of Gregory C. Krug, p. 99; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

After his father's death, Gregory Krug became co-trustee of the Trusts which had been created by his father. Krug decided to "restate and amend" the Krug Investments Partnership Agreement so as to create a partnership among his mother, himself, and the various Trusts that had been created by George C. Krug. Gregory Krug personally prepared an "Amended and Restated" Krug Investments Partnership Agreement, which named Gregory Krug and his mother, in their individual capacities, were named as co-managing partners. (*Id.* at 97). Mr. Krug claimed that the purpose of the new partnership was to create an economy of scale, but it also allowed him to commingle his personal funds with funds from the Trusts. (*Id.*)

Krug drafted the Amended Krug Investments Partnership Agreement by borrowing and modifying specific

provisions of other various Partnership Agreements located in his office. (*Id.* at 102-04).

On July 19, 1988, Krug wrote a letter to Wilson, asking Wilson to review his draft of the Amended Krug Investments Partnership Agreement. In this letter, Krug stated, "I would appreciate your reviewing it, primarily with a view as to whether this arrangement is equitable to Mother, Kaki, and Carol, and secondarily, as to compliance with local law." (*Id.* at 104; Exhibit 10 to Deposition of Gregory C. Krug). (Kaki and Carol are Mr. Krug's sisters). Krug alleged that he had two telephone conversations with Wilson regarding the creation of Krug Investments. (*Id.*) Although he could recall neither the precise dates nor the specific content of these conversations, Krug alleged that during one of these conversations, he discussed his personal desire to avoid protracted litigation. (Deposition of Gregory C. Krug, pp. 104-07, 109; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). Krug believed that at least one of these telephone calls with Wilson occurred prior to sending the letter of July 19, 1988. (*Id.*)

On July 22, 1988, Wilson responded in writing to Krug's letter of July 19. (*Id.* at 110-11; Exhibit 12 to Deposition of Gregory C. Krug). In his letter, Wilson stated, "We have reviewed the Partnership Agreement and find it to be very complete and in compliance with Tennessee law." (*Id.*) On or about July 22, 1988, Gregory Krug and his mother executed the Amended Krug Investments Partnership Agreement. (Deposition of Gregory C. Krug, pp. 96-97, 101; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record

Document No. 53; Exhibit 9 to Deposition of Gregory C. Krug).

By January of 1990, a dispute had developed between Gregory Krug and his mother, Eleanor Krug. The dispute concerned Eleanor Krug's desire to utilize trust funds to purchase a condominium in West Knoxville. (Deposition of Gregory C. Krug, pp. 118-19; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). On January 24, 1990, Wilson called Krug and they discussed the dispute between Greg and his mother. (*Id.* at 120).

On February 6, 1990, Gregory Krug sent a letter to Wilson, via facsimile transmission, regarding the dispute between him and his mother. (*Id.* at 119-20; Exhibit 16 to Deposition of Gregory C. Krug). In this letter, Mr. Krug stated, "The purpose of this letter is to respond to the positions you expressed during our telephone conversation of January 24 regarding *your client.*" (*Id.*) (emphasis added). The letter set forth, from Gregory Krug's perspective, the basis for the dispute between Krug and his mother. The letter also described the telephone calls received by Krug on January 24, 1990, from Eleanor Krug and Bill Wilson, and it set forth Krug's interpretation of each of these calls. The letter stated Mr. Krug's displeasure and disagreement with his mother's desire to sell the family home. Krug proposed an offer of compromise, stating, "[i]n lieu of what would be a very ugly lawsuit, let me suggest the following. . . . " Krug concluded his letter of February 6, 1990, by stating:

> If this proposal is not acceptable, *let the litigation begin*. Remember that, even if your client succeeds in causing the Bank to replace me as a co-

> trustee, in my capacity as a beneficiary I will *enjoin* the Bank (as she will surely be fired by the *court*) to prevent it from purchasing a new residence at an excessive price and/or prematurely disposing of the old residence.

(*Id.*) (emphasis added).

On February 13, 1990. Wilson wrote to Gregory Krug on behalf of Eleanor Krug. Wilson provided Gregory Krug with written notice that Eleanor Krug was going to exercise her discretion to remove him as co-trustee of the various Krug Family Trusts. (Deposition of Gregory C. Krug, pp. 125-126; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 20 to Deposition of Gregory C. Krug). Upon receiving this letter, Gregory Krug began consulting with various attorneys in regard to this dispute. (Deposition of Gregory C. Krug, pp. 126-31; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

On February 20, 1990, in response to his receipt of a document entitled "Removal of a Co-Trustee," the plaintiff wrote to Valley Fidelity. Gregory Krug stated his opinion that the removal document was without legal effect, and he issued the following warning:

> By now, you should realize that you are not a co-trustee with respect to these trusts and that, were you to consent to a transaction to which I have objected, you will be liable for damages. Let me suggest that it is in the Bank's best interest to take no action with respect to this matter *until a court of competent jurisdiction has reviewed the facts and rendered a decision* as to the

> identity of the trustee(s) and the appropriateness of the proposed transactions. *As soon as I can retain local counsel, I will initiate this action.*

(*Id.* at 133; Exhibit 25 to Deposition of Gregory C. Krug) (emphasis added).

At this point, local counsel was being sought by Krug with the assistance of Atlanta, Georgia attorney Doug McAlpine. (Deposition of Gregory C. Krug, pp. 133-34; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

Sometime prior to March 1, 1990, Gregory Krug retained Knoxville attorney James Kelly Giffin in connection with this dispute. (*Id.* at 135). On March 1, 1990, Giffin wrote Wilson regarding the Krug dispute. In that letter, Giffin accepted an offer of settlement which had been proffered by Wilson by a letter of the same date. (*Id.*; Exhibit 26 to Deposition of Gregory C. Krug).

The settlement agreement referenced in the Giffin letter of March 1, 1990, went sour. At some point prior to May 21, 1990, Krug received a document entitled "Removal of Co-Trustee of the George Charles Krug Trusts." (Deposition of Gregory C. Krug, pp. 139-41; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 29 and 30 to Deposition of Gregory C. Krug). Mr. Krug contends that he and his mother had entered into a "false truce" since her earlier removal notice. (Deposition of Gregory C. Krug, p. 140; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). This second removal notice, which had been duly executed by Eleanor Krug on May

18, 1990, stated that Eleanor Krug was removing Gregory Krug as co-trustee of the Family trusts and replacing him with Valley Fidelity Bank & Trust Company, pursuant to her powers as set forth in the Trust Agreement. The receipt of this document prompted Mr. Krug to seek legal advice from the California law firm of Hamilton & Samuels. (*Id.* at 139-41; Exhibits 29 and 30 to Deposition of Gregory C. Krug). On May 21, 1990, Mr. Krug responded to this document by writing to Valley Fidelity of his intention "to contest this matter under theories too numerous to present here." (Deposition of Gregory C. Krug, p. 141; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 30 to Deposition of Gregory C. Krug). In his letter of May 21, 1990, he warned that, "as soon as I can determine which of my law firms will represent the Trusts and me in a lawsuit against Mrs. Krug, Mr. Wilson, and certain other parties, you will be contacted. I anticipate that this will occur by the end of this week." (*Id.* at 142).

On May 25, 1990, attorney Marc S. Hines of the Hamilton & Samuels law firm wrote the Senior Vice-President of Valley Fidelity, stating that Gregory Krug would be filing a lawsuit against Bill Wilson, Eleanor Krug, Carol Krug, and Catherine Crudup, in the Superior Court for Orange County, California. (Deposition of Gregory C. Krug, p. 144; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 32 to Deposition of Gregory C. Krug).

On May 31, 1990, Eleanor Krug and Valley Fidelity filed suit in the Chancery Court for Knox County, Tennessee, against Gregory Krug, Krug Investments and Morgan-Keegan & Company, Inc. (Chancery Court for Knox County, Tennessee, Case No. 105013-2) (the "Knox County Litigation").

In the Chancery Court lawsuit, Eleanor Krug and Valley Fidelity sought a declaratory judgment replacing Gregory C. Krug as co-trustee of the Krug Investment Partnership, an Order enjoining the removal of funds from the partnership, an accounting of partnership funds, and a dissolution of the partnership. (Knox County Litigation). After this lawsuit was filed, Mr. Krug raised the issue of the arbitration clause in the Partnership Agreement for the first time. However, it was held by the Chancellor that the arbitration clause did not apply to partnership dissolution. Judgment was entered in favor of Eleanor Krug granting, among other things, injunctive relief against Gregory Krug and dissolution of the partnership. Gregory Krug appealed, but the Tennessee Court of Appeals affirmed. *Krug v. Krug*, 838 S.W.2d 197 (Tenn. Ct. App. 1992) (perm. app. denied by the Tennessee Supreme Court). *See also* Judgment and Memorandum of Chancellor Inman, (Memorandum of Judgment in Knox County Litigation).

In this case, Mr. Krug appealed from the United States District Court's granting of the respondents' Motion for Summary Judgment. After examining Krug's Brief and exhibits and the respondents' argument, which is based on the affidavit of an expert in the field of legal

ethics, partnership and trusts, Judge Jordan granted summary judgment to the respondents, ruling that no genuine issue of material fact exists regarding the alleged negligence and malpractice of the appellees. Furthermore, "the plaintiff had the duty to come forward with opposing expert testimony, to show the existence of a genuine issue of material fact. . . . [but he] has not carried this burden, after a very full opportunity to do so." (Memorandum Opinion and Order, p. 5; Record Document No. 61).

The Sixth Circuit Court of Appeals affirmed.

The respondents submit that the Statement of the Case in Krug's Petition for Writ of Certiorari, primarily at pages 2-4, includes alleged facts which are outside the record. The alleged details of prior family litigation and the various mental impressions and discussions are not matters of proof in this case.

SUMMARY OF ARGUMENT

The claims raised by Mr. Krug in this action are based upon state law which is supported by long-established legal doctrines. There are no special and important reasons which would warrant review by the Supreme Court.

The Courts below properly granted respondents' Motion for Summary Judgment because no genuine issue of material fact exists as to negligence on the part of any defendant. Additional factors also support the granting of this Motion for Summary Judgment:

1. Both the original and Amended Complaint fails to state a claim upon which relief can be granted;

2. Claims exceed the state statute of limitations found at Tennessee Code Annotated § 28-3-104(a)(2) (1980);

3. There is no attorney-client relationship between Mr. Krug and respondents; and

4. There is no evidence showing that the alleged failure of respondents to notify petitioner about the non-resident fiduciary resident registration requirement constitutes negligence.

Thus, the Sixth Circuit's affirmation of the District Court's granting of the Motion for Summary Judgment should stand. Petition for Writ of Certiorari to the United States Supreme Court should be denied.

ARGUMENT

A. CLAIMS BASED UPON CONTRAVENTION OF STATE LAW WHICH ARE SUPPORTED BY LONG-ESTABLISHED LEGAL DOCTRINES DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only when there are special and important reasons therefor." The text of the rule sets forth specific reasons that satisfy this standard, which include conflicts between decisions of various circuit courts of appeal or decisions by state or federal courts concerning significant issues of federal law.

This action fails to meet the standard of Rule 10. This action involves an established doctrine for granting a motion for summary judgment and presents no special or important circumstances which would distinguish it from numerous other cases where such a motion is granted. The issues of this case are not of a magnitude sufficient to warrant review by this Court. The appeal to the Sixth Circuit was from the trial court's ruling on a Motion for Summary Judgment in a common law tort action for legal malpractice made in accordance with the usual course of judicial proceedings. The trial court properly evaluated the record which includes an expert opinion, by way of affidavit, on behalf of the respondents. The Court properly noted that the petitioner did not come forward with appropriate rebuttal evidence to create an issue of fact on the threshold issue of legal malpractice and properly dismissed the case. The issues were exclusively those of the application of state common law and federal procedure to the facts of the case. Summary judgment was properly applied in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The plaintiff has had a fair and adequate opportunity for consideration of these issues by the Courts below.

This case does not involve a conflict with other courts of appeals or conflicts between state courts regarding a federal question, does not involved a departure from the usual course of judicial proceedings, and does not involve an important question of federal law which should be settled by this Court. The Petition does not raise any of the criteria of Rule 10, and none of those criteria are met by the facts and circumstances of this

case. Accordingly, the respondents respectfully submit that the Petition should be denied.

B. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS WHERE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO NEGLIGENCE ON THE PART OF ANY DEFENDANTS.

The record in this case clearly shows that Wilson complied with the applicable standard of care for an attorney in the Knoxville, Tennessee community. Mr. Krug failed in his burden to provide any evidence contradicting the testimony contained in the respondents' expert affidavit.

Petitioner Krug claims that Wilson was negligent in rendering advice on the 1988 Partnership Agreement. Wilson maintains that his opinion regarding this agreement was within the appropriate standard of care for attorneys in this community. Wilson supports his Motion on this point with the affidavit of Attorney Fredrich Thomforde. Petitioner Krug failed to respond with a counter-affidavit or with any other material proof as to any negligence on the part of Wilson in this matter.

After a thorough review of the pleadings, depositions, and other relevant materials in this matter, Mr. Thomforde, a noted expert in the areas of legal ethics, partnerships, and trusts, stated that even assuming "that William C. Wilson undertook, in July, 1988, to represent Gregory C. Krug,. . . . [and] that Gregory Krug's July 19, 1988, letter to Wilson . . . includes a request that Wilson

review the arbitration clause,. . . . this advice is correct and complies with the standard of care exercise by lawyers of ordinary prudence, care skill and diligence in this community." (Affidavit of Fredrich H. Thomforde, Jr., pp. 4-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

It is well established that the burden is on "the plaintiff who opposed a motion for summary judgment in a case in which expert testimony is essential to come forward with such testimony at the summary adjudication stage of the litigation, or suffer dismissal for his failure to carry this burden. . . . " Memorandum Opinion, p. 5, *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Petitioner has never made such showing. Even taking all of the material submitted by Krug in his pleadings and briefs as true does not lend any credibility to his contention that the respondents violated a duty owed to him. (Memorandum Opinion and Order, p. 43, Record Document No. 61).

The petitioner's reliance on *Celotex* is misplaced. The respondents submit that the trial court properly relied on *Celotex* in dismissing the case. *Celotex* authorizes and sanctions the use of summary judgment in cases where the nonmoving party fails to properly rebut the evidence presented by the movant so as to create an issue of material fact. The trial court, in accordance with *Celotex*, properly ruled that the respondents' motion shifted the burden to the petitioner to come forward with evidence showing that his claim for legal malpractice had a factual basis. He did not do so. As the plurality in *Celotex* held, summary judgment should be entered against a party

who fails to sufficiently show the existence of an essential element to the party's case on which the party will bear the burden of proof at trial, following Federal Rule of Civil Procedure 56(c). *Celotex* at 323. The plaintiff here failed to present essential expert testimony to support a claim for legal malpractice.

In Tennessee, a lawyer's professional conduct is measured against that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction. *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984); *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986). Except in the most extreme cases, the standard of care applicable to a lawyer in the given situation should be proven by using expert testimony. *Cleckner*, 719 S.W.2d at 540. Likewise, whether a lawyer's conduct in a given case meets or departs from the applicable standard of care is also an issue which must be proven by expert testimony. *Id.* Respondents presented competent expert testimony of the applicable standard of care and competent expert testimony that the respondent acted in compliance with that standard at all times. (Affidavit of Fredrich H. Thomforde, Jr., pp. 1-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

Petitioner failed to meet his burden of providing expert testimony to show evidence that respondents' negligence exists. Mr. Krug cites *Killingsworth v. Poon*, 307 S.E.2d 123 (Ga. Ct. App. 1983), for the proposition that expert testimony is not required if the negligence is so blatant as to be obvious to a jury composed of laymen. Petitioner's reliance on *Killingsworth* is unwarranted. The alleged negligence involved in this case consists of the

interpretation of a complex Partnership Agreement involving multiple trusts and partners. Even assuming that negligence is present, no jury composed of laymen would ever be able to discern the presence and extent without expert guidance. Moreover, it seems entirely unlikely that an unguided jury could ever find any evidence of negligence in this case for the simple reason that respondents committed no negligent act. The trial court properly decided that expert testimony was required.

Petitioner's reliance on the statements of the chancellor in the previous case as giving credence to his theory of negligence is both misplaced and incorrect. As the District Court noted, reliance on this testimony is misguided because "[t]here is nothing in what the chancellor said, however, which addresses the professional duty, if any, the defendant Mr. Wilson and his law firm owe to the plaintiff, the scope of any such duty, and whether the moving defendants breach any such duty. . . . [N]o such issue of alleged attorney malpractice was before Chancellor Inman." (Memorandum Opinion and Order, p. 4; Record Document No. 61). The record will show that the Chancellor's comments were nothing more than dialogue of a discussion between him and the lawyers regarding general observations of the Chancellor about the Partnership Agreement that Mr. Krug had drafted. The record will further show that in Chancellor Inman's actual Judgment and Memorandum Opinion, none of this dialogue served as a basis for his opinion. (Memorandum Opinion and Order; Record Document No. 61).

Contrary to the petitioner's contention, all doubt as to the existence of any genuine issue of material fact were resolved in favor of the petitioner. The conclusion

reached by Mr. Thomforde (Affidavit of Fredrich H. Thomforde, Jr., pp. 1-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53), was supported by Judge Jordan's decision.

> Even accepting as true, for the purpose of ruling on the Rule 56 motion before the court, the plaintiff knew that there was a client-attorney relationship between him and these defendants and that the defendants' professional obligation extended to counselling concerning the arbitration clause in the proposed Krug Investments partnership agreement, there is nothing here to establish that an issue exists concerning whether the defendants' failure, if any, to predict or to guard against the chancery court's ultimate ruling that a suit to dissolve the partnership was within its jurisdiction, and not subject to arbitration, was a breach of the applicable standard of professional care.

(Memorandum Opinion and Order, p. 4, Record Document No. 61).

Quite obviously, Krug's objections to the District Court's Judgment must be rejected on every issue. Krug was given the benefit of every possible doubt in the District Court's ruling, yet he failed to meet his burden to show that any issue could ever be resolved in his favor by a rational jury. The court owed no duty to Krug, as a pro se defendant in a civil action, to provide him with any notice whatsoever of his right to file a counter-affidavit. Moreover, even after resolving all possible doubt in Krug's favor, and even assuming that there existed an attorney-client relationship between Krug and Wilson

neither a recognized expert in the field of legal ethics nor the United States District Court could find that there was any genuine issue of material fact supporting the alleged malpractice of the petitioner. The District Court's granting of summary judgment to the appellees should be affirmed.

C. ADDITIONAL FACTORS WHICH WERE PRESENTED TO THE COURTS BELOW SUPPORTING THE GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS INCLUDE:

The District Court sustained the Motion for Summary Judgment on the grounds that there was no issue as to breach of the standard of care. Below are discussed additional grounds raised in the respondents' motion that would also support summary judgment if reached by the trial court.

I. COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

a) Petitioner's allegation that the Partnership Agreement was negligently approved by respondents fails to state a claim upon which relief can be granted. Petitioner alleges that on or about July 19, 1988, he retained the legal services of Wilson and the Ambrose Wilson law firm. Petitioner claims that, while acting within the scope of an attorney/client relationship thus created, Mr. Wilson negligently advised him that the arbitration clause placed into the Amended Krug Investments Partnership Agreement would prevent litigation without exception.

The forgoing allegations, even if true, would not give rise to a legal claim upon which relief can be granted. Furthermore, there is no Tennessee authority stating that the inclusion of an arbitration clause in an amended partnership agreement would prevent litigation seeking judicial dissolution. Under the Uniform Partnership Act found at Tennessee Code Annotated § 61-1-131, courts of competent jurisdiction are empowered to dissolve partnerships on application of a partner. Thus, it does not appear that an arbitration clause contained within a Partnership Agreement, no matter how inflexible, could effectively prevent litigation seeking judicial dissolution in every case.

Petitioner bears the burden of proof on the issue of damages and he cannot establish this essential element. Therefore summary judgment should stand. *Celotex*, 477 U.S. 317; *Goodman v. Phythyon*, 803 S.W.2d 697 (Tenn. Ct. App. 1990).

b) Petitioner's allegation that respondents violated the Code of Professional Responsibility is without merit and fails to state a claim upon which relief may be granted. This issue was recently laid to rest in *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991). The Supreme Court of Tennessee stated, "conduct that violates the code may not breach a duty to the client and therefore will not constitute actionable malpractice." *Id.* at 404. The court approved cases from numerous jurisdictions which held that state Codes of Professional Responsibility doe not create private causes of action for damages. *Id.* at 404-05.

c) Petitioner's allegation regarding the alleged conflict of interest among respondents also fails to state a claim upon which relief may be granted. In *Stone & Hinds, supra,* the Court stated:

> In cases involving successive representations, a party is required to move that his former lawyer be disqualified as soon as he is aware of the conflict, provided the motion for disqualification or the granting thereof would not place the former client at an unfair disadvantage. *See, Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85 (9th Cir. 1983). The client cannot hold the right in reserve for tactical purposes until it would be most helpful to his position. Failure to move for disqualification at the earliest practical opportunity will constitute a waiver. *See, Central Milk Producers Cooperative v. Sentry Food Stores,* 573 F.2d 988 (8th Cir. 1978).

Stone & Hinds, 813 S.W.2d at 410.

At no time during the underlying Chancery Court proceedings did Mr. Krug move to disqualify the Ambrose Wilson firm based upon the firm's alleged previous representation of Krug. (Affidavit of Paul T. Coleman, pp. 1-2; Record Document No. 24). To that extent, it should be noted that in *Stone & Hinds,* the plaintiff did at least raise the conflict of interest issue within the same lawsuit, albeit not until appeal. *Stone & Hinds,* 813 S.W.2d at 410-11. In the chancery litigation which preceded this case, however, petitioner never raised the issue of the alleged conflict, not even on appeal. (Affidavit of Paul T. Coleman, pp. 1-2; Record Document No. 24). *See also Krug v. Krug,* 835 S.W.2d 197 (Tenn. Ct. App. 1992).

Mr. Krug moved to disqualify the Ambrose Wilson firm based upon a different alleged conflict of interest, one which was claimed to exist because of the firm's dual representation of Eleanor Krug and Valley Fidelity. (Deposition of Gregory C. Krug; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). The motion was subsequently denied. Yet nowhere in this detailed motion did Gregory Krug ever claim that *he* was previously represented by respondents. Moreover, nowhere in this motion did Mr. Krug ever claim conflict of interest because of alleged prior representation of him by Wilson or Ambrose Wilson.

Furthermore, even in Krug's own deposition, Krug never voiced any objection to Wilson's representation of his mother in connection with the dispute regarding the partnership funds. (*Id.* at 141). Quite to the contrary, when questioned about Wilson's representation of Eleanor Krug, the plaintiff stated, "I think I even welcomed it." (*Id.*) Accordingly, Mr. Krug had waived any claim based upon an alleged conflict of interest, and the dismissal of all such claims should be upheld.

d) Lastly, the alleged breach of the *in terrorem* clause and the allegations of unreasonable or excessive legal fees fail to state claims upon which relief may be granted. As to these "novel" claims set forth in the Amended Complaint, respondents respectfully submit that such allegations do not state claims upon which relief can be granted and should be dismissed.

II. PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Petitioner's claims are barred by the state statute of limitations found at Tennessee Code Annotated § 28-3-104(a)(2) (1980), which provides that actions against attorneys, whether based on contract or tort, shall be commenced within one year after the cause of action has accrued. Petitioner had notice of the wrongs alleged as early as February 6, 1990, and no later than May 31, 1990, yet this lawsuit was not filed until June 10, 1991, more than one year after his alleged cause of action accrued.

A cause of action for legal malpractice accrues as of the date on which the alleged negligence becomes irremediable. *Americount Club, Inc. v. Hill*, 617 S.W.2d 876, 879 (Tenn. 1981); *Chambers v. Dillow*, 713 S.W.2d 896, 898 (Tenn. 1986); *Batchelor v. Heiskell, Donelson, Bearman, Adams, Williams & Kirsch*, 828 S.W.2d 388, 393 (Tenn. Ct. App. 1991). The legal malpractice cause of action accrues when the plaintiff discovers, or in the exercise of reasonable care and diligence should have discovered, that he has been injured. *Batchelor*, 828 S.W.2d at 893; *Nobes v. Earhart*, 769 S.W.2d 868, 871-72 (Tenn. Ct. App. 1988). The statute of limitations will be tolled only during that period when the claimant had no knowledge that a wrong occurred, and as a reasonable person, was not put on inquiry. *Price v. Becker*, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991). A plaintiff cannot be permitted to wait until he knows of all the injurious effects as consequences of an actionable wrong before he commenced the lawsuit. *Chambers*, 713 S.W.2d at 898; *Security Bank and Trust Co. v.*

Fabricating, Inc., 673 S.W.2d 860, 864-65 (Tenn. 1983); *Memphis Aero Corp. v. Swain*, 732 S.W.2d 608 (Tenn. Ct. App. 1987).

In this case, Gregory Krug claims that in 1988 he was negligently advised in connection with the arbitration clause contained within the Amended Krug Investments Partnership Agreement. Petitioner also claims a cause of action based on an alleged conflict of interest in the representation by Mr. Wilson of his mother, Eleanor Krug. By February 6, 1990, petitioner knew that the ongoing Partnership dispute between him and his mother could very possibly result in litigation. Furthermore, Mr. Krug was well aware as early as February, 1990, that Wilson was representing Eleanor Krug in the Partnership dispute, and he repeatedly referred to Mrs. Krug as Wilson's "client". (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibits 16, 24, and 28 to Deposition of Gregory C. Krug). At that time, petitioner made an offer of compromise "[i]n lieu of what would be a very ugly lawsuit." (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 16 to Deposition of Gregory C. Krug). Moreover, he used the possibility of such litigation as a bargaining chip by proclaiming, "If this proposal is not acceptable, let the litigation begin." (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). He again threatened to institute litigation on February 20, 1990, (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief

in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 25 to Deposition of Gregory C. Krug) and on May 25, 1990 (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 32 to Deposition of Gregory C. Krug). His mother filed the lawsuit on May 31, 1990.

Petitioner and his California law firm, Hamilton & Samuels, threatened to sue Wilson for more than one year prior to the filing of this suit. (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). On May 25, 1990, Hamilton & Samuels wrote on behalf of Mr. Krug to Mr. Robert Killefer a letter in which the following is contained:

> A lawsuit will be filed on Orange County Superior Court in the State of California *naming William C. Wilson*, Eleanor B. Krug, Carol Krug, and Kathy Crudup, and others, as defendants for causes of action including but not limited to conspiracy to breach the Krug Family Trusts, conspiracy to commit fraud against Gregory C. Krug a beneficiary of the Krug Family Trusts, breach of the Krug Family Trust, wrongful termination of Gregory C. Krug as trustee of the Krug Family Trusts, and for fraud.

(*Id.*) (emphasis added). For whatever reason, Krug contends that beginning January 24, 1990, he experienced emotional distress that was "worse than Vietnam" – far more than one year prior to the filing of this suit.

Petitioner was certainly aware of Wilson's representation of his mother in connection with the Krug family dispute no later than February of 1990. (*Id.* at 86).

III. ABSENCE OF ATTORNEY/CLIENT RELATIONSHIP.

No attorney/client relationship existed between the petitioner and William C. Wilson or the Ambrose Wilson law firm.

In his Complaint, the plaintiff alleges:

> On or about July 19, 1988, in his capacity as a trustee of the George C. Krug Trust (hereinafter referred to as GCK Trust), and also as a partner in the Partnership and in his individual capacity, Plaintiff retained William C. Wilson (hereinafter referred to as "Wilson") and the law firm of Ambrose, Wilson, Grimm and Durand to provide advice to the Plaintiff, the Partnership and the GCK Trust concerning Plaintiffs duties and responsibilities in serving as a Co-Trustee, and amending and restating the Partnership's agreement prior to transferring the assets of the GCK Trust to the Partnership.

(Complaint, p. 2; Record Document No. 1). Petitioner's assertion is disingenuous and the respondents emphatically deny the truth of this allegation. The record of the conduct, writings, and statements of Mr. Krug provides unequivocal evidence that Wilson was never Mr. Krug's attorney, and that it was not Mr. Krug's intent that he act as such. Because the respondents were not Mr. Krug's attorneys, they owed no duty to him and, accordingly, respondents respectfully request that dismissal of all allegations of legal malpractice be affirmed.

IV. NON-RESIDENT FIDUCIARY.

There is no evidence of any showing of the alleged failure of defendants to notify plaintiff about the non-resident fiduciary resident registration requirement in any way constituted negligence. Regarding the allegation that the respondents negligently failed to advise petitioner of the non-resident requirement, the respondents submit that there is no evidence whatsoever that they were ever asked to provide legal advice to Mr. Krug regarding his duties as co-trustee of the Krug Family Trusts. Respondents adamantly deny that they were ever asked to provide such advice. Mr. Krug does not allege how this has damaged him. Moreover, this allegation is moot since Chancellor Inman did not rely on this issue in any way in reaching his decision. (Chancery Court for Knox County, Tennessee; Memorandum Opinion April 5, 1991). Mr. Krug alleges that his failure to register as a non-resident fiduciary resulted in the Partnership being placed on receivership. This simply is not a fact and is not supported by Chancellor Inman's Opinion. Accordingly, dismissal of this claim should be upheld.

CONCLUSION

The respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The petitioner has had this record properly reviewed both at trial court and appellate court levels. The respondents respectfully submit that the

decisions of these courts are proper and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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